HIPPARION (M) SDN. BHD.

v.

CHUNG KHIAW BANK LTD.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 35 OF 1988]
8 APRIL 1989

CONTRACT: *Assignment of property - Whether assignment was absolute assignment or assignment purporting to be by way of charge.*

The plaintiff entered into an agreement with defendant to grant the latter a loan of RM1 million repayable with interest thereon at the rate of 13.5% per annum in accordance with the terms and conditions specified in the agreement. It was *inter alia* provided that the defendant was granted a contractual licence of the property known as the 3rd floor, Holding 355, Town Subdivision 14, North East District, Penang which the plaintiff had a right to terminate by notice and enter into upon the property.

By way of security for the loan the defendant executed a deed of assignment dated 3 September 1983 whereby it assigned absolutely to the plaintiff all its rights, title and interest in the property.

The plaintiff commenced action against the defendant for the sums due and owing to it by the defendant together with an order that the defendant do quit and deliver vacant possession of the property.

Held:

[1] Whether an assignment was absolute or by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956 should be gathered from within the four corners of the documents concerned.

[2] On the facts of this case the deed of assignment executed by the defendant was an absolute assignment and not purporting to be by way of a charge. The intention of the parties was clearly that the plaintiff was to have all the rights, title and interest of the assignor in the property.

[Appeal dismissed with costs.]

Cases referred to:

Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd. [1985] CLJ (Rep) 231
Citibank NA v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282
Mahadevan & Anor. v. Manilal & Sons (M) Sdn. Bhd. [1984] 1 CLJ (Rep) 230

Legislation referred to:

Civil Law Act 1956, s. 4(3)
National Land Code 1965, s. 257

For the appellant - K.S. Narayanan; M/s. Jayaraman, Ong & Co.
For the respondent - Louis Van Buerle; M/s. Cheong Wai Meng & Van Buerle

JUDGMENT

Gunn Chit Tuan SCJ:

This was another appeal involving the interpretation of a deed of assignment executed on 3 September 1983, between Hipparion (M) Sdn. Bhd. (the defendant) as assignor of the one part and Chung Khiaw Bank Ltd. (the plaintiff) as assignee of the other part.

Briefly the material facts, which are not in dispute, are that on 3 September 1983, the plaintiff, a licensed bank, entered into an agreement with the defendant, an incorporated company, whereby the plaintiff granted a loan of one million ringgit to the defendant repayable with interest thereon at the rate of 13.5 per cent per annum or at such rate as the plaintiff may specify, from time to time, in accordance with the terms and conditions specified in the said agreement. It was also provided in the said agreement that the defendant would remain in possession of a property known as the Third Floor of a building standing on Holding 355, Town Subdivision 14, North East District, Penang, as a contractual licensee only of the plaintiff. It was further provided in the said agreement that in the event of default being made by the defendant in the payment of any one or more of the instalment payments covenanted to be made in the manner provided, the plaintiff was to be at liberty to demand immediate payment on the balance and in the event of any part of the same remaining unpaid after fourteen days from the date of such demand, the plaintiff would have the right to terminate the licence of the defendant by notice in writing and to enter upon the property and to deal with all its rights, title and interest as owner thereof in all respects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer such rights, title and interest at such price and in such manner and subject to such conditions as the plaintiff shall in its absolute discretion deem fit free from any interest of the defendant.

By way of security for the loan the defendant also executed the said deed of assignment dated 3 September 1983 whereby it assigned absolutely to the plaintiff all its rights, title and interest in the said property and in respect of a sale and purchase agreement dated 13 April 1981 whereby the defendant had bought the same property from a company called Penang Garden Sdn. Bhd.

The defendant defaulted in making payments due under the said agreement and the plaintiff through its solicitors caused to be issued a notice in writing on 14 August 1985, demanding repayment of the loan together with accrued interest thereon within 14 days from the date of the demand. The plaintiff also caused to be issued another notice in writing on 30 August 1985 stating that if its demand for payment aforesaid was not complied with, it would proceed with the sale of the said property by advertising in the local press without further reference to the defendant.

On 30 January 1986, the plaintiff commenced proceedings by way of originating summons in the High Court at Pulau Pinang seeking a declaration that the sum due and owing by the defendant under the said agreement as at 31 July 1985, is RM1,072,013.17, for principal and interest and further interest continues to accrue thereon at the rate of 14 per cent per annum from 1 August 1985, is also due till the date of payment. It also sought orders that the defendant do quit and deliver vacant possession of the property within 7 days from the date of service of the Court order and that the plaintiff may be at liberty to sell by public auction and/or private treaty the said property.

It was submitted by Counsel for the defendant in the Court below that the plaintiff was seeking to enforce a security for repayment of a loan and that the security documents concerned could be construed either as a security relating to land or a security relating to a

chose in action. It was firstly contended that if the security documents were construed as a security relating to the land, then the plaintiff's remedies would be restricted to orders of Court under s. 257 of the National Land Code and the sale, if there was to be one, would have to be by way of a judicial sale by public auction. But it was contended that as the documents were not in the form prescribed by the National Land Code the plaintiff's claim should be dismissed with costs.

It was, however, also submitted by way of alternative that at best the security interest created by the assignment and the said agreement was a security over a chose in action. But it was contended that the assignment purported to be by way of charge only as opposed to an absolute assignment and it was not open to the plaintiff to claim any beneficial interest in the said property.

Counsel for the plaintiff contended in the High Court that whether or not an assignment is absolute or by way of charge only within the meaning of the s. 4(3) of the Civil Law Act 1956, should be gathered from within the four corners of the documents concerned. He cited and relied on the Federal Court case of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] CLJ (Rep) 231. He further contended that if so construed, the assignment was absolute whereby all the defendant's rights, benefits and interest in the property had passed to the plaintiff, albeit by way of security. He also pointed out that the security in this case was a security relating to a chose in action, being an assignment of the defendant's rights, benefits and interest in the property under the said sale and purchase agreement of the property in respect of which strata titles have not yet been issued. As the security relates to a chose in action the provisions of the National Land Code could not apply and it followed that the relative rights of the defendant as an assignor and the plaintiff as assignee must be governed by contractual principles.

The learned Judge had no hesitation in upholding the submissions of Counsel for the plaintiff and, applying contractual principles, he concluded that the defendant's rights and benefits under the sale and purchase agreement had been assigned to the plaintiff under the assignment and that the defendant's right to possession after the assignment depended entirely upon the contractual licence granted to him by the plaintiff. As it was not in dispute that there had been default by the defendant in making payments specified in the agreement the plaintiff had lawfully exercised its right to terminate the licence and was entitled to enter upon the property and to deal with all the rights, title and interest in relation to it.

Mr. Narayanan who appeared for the defendant in this appeal before us also referred to *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* (*supra*) and conceded that the assignment in this case was an assignment of a chose in action. But after referring to the Federal Court judgment in *Citibank NA v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282 he submitted that the Court in this case should also consider certain letters from the plaintiff to the defendant which, he stated, gave evidence of the factual background of the case. Then after referring to s. 4(3) of the Civil Law Act 1956, he contended that the word 'charge' in the said section must mean an equitable charge. He then referred to the Federal Court case of *Mahadevan & Anor. v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ (Rep) 230 in which it was, *inter alia*, held that there was no provision in the National Land Code prohibiting the creation of equitable charges or liens which are permissible under our land law. In that case, it was also held that the words 'other charge on land' in s. 21(1) of the Limitation Act must be construed to include equitable charges or liens as well. Mr. Narayanan therefore concluded that the assignment in this case was not absolute but was by way of charge only.

Mr. Louis Van Buerle, who appeared for the plaintiff in the Court below and before us, also referred to *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* (*supra*) and submitted that this was a case of absolute assignment. As the question of an equitable charge did not arise in this case, he submitted that there was no need for the Court to refer to *Mahadevan & Anor. v. Manilal & Sons (M) Sdn. Bhd.* (*supra*).

We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank's* case but with a deed of assignment. We would therefore reiterate what this Court has said in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* (*supra*) "that whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself;". Now whatever the parties might have as lay men stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn. Bhd. of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of ringgit one million to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:

> In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee all his right title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Looking at the document we agreed with the conclusion of the learned Judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given "by way of charge" is not one which absolutely transfers the property. As we have come to the conclusion that it was an absolute assignment we did not think it necessary to consider the contention of Counsel that an equitable charge was made in this case. The appeal of the defendant was therefore dismissed with costs.

Also found at [1989] 2 CLJ 101